

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**CRIMINAL MISC.APPLICATION No. 3107 of 2007
with
CRIMINAL MISC.APPLICATION No. 3103 of 2007****For Approval and Signature:****HONOURABLE MR.JUSTICE M.R. SHAH**

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1 Whether Reporters of Local Papers may
be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the
fair copy of the judgment ?

4 Whether this case involves a substantial
question of law as to the interpretation of
the constitution of India, 1950 or any
order made thereunder ?

5 Whether it is to be circulated to the civil
judge ?

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**GOODWILL ADVANCE CONSTRUCTION
COMPANY,THRO'PROPRIETOR - Applicant(s)**

Versus

THE STATE OF GUJARAT & 1 - Respondent(s)

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Appearance :

MR UA TRIVEDI for Applicant(s) : 1,
MR KODEKAR ADDL. PUBLIC PROSECUTOR for
Respondent(s) : 1,
MR PRAKASH K JANI for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 26/06/2007

ORAL JUDGMENT

Rule. Shri RC Kodekar, learned APP waives service of rule on behalf of the respondent No.1 and Shri PK Jani, learned advocate appearing on behalf of the respondent No.2.

2. As common question of law and facts arise, both these applications are being disposed of by this common judgment and order.

3. Both these applications are filed by common applicant, - original accused No.5 to quash the criminal case No.1107 of 2004 as well as No. 1106 of 2004 filed by the respondent No.2 in the Court of learned JMFC, Visnagar filed under section 138 of the Negotiable Instrument Act (for short "the Act").

4. It is the case of the respective applicants that the applicant is a proprietary concerned dealing in Government contracts and that it entered into an agreement of joint venture with one Kantibhai Gobarbhai Chaudhary, Proprietor of M/s Arbuda Builders, Visnagar for the project of Bhakhar Water resources project and the

said agreement of joint venture for the construction work was executed on 26-7-2002. That on 24-12-2002, the Executive Engineer, Dharoi Canal, Visnagar intimated the applicant that their tender offer has been accepted and a work order issued by letter dated 26-1-2003. It is the case of the applicant that said Kantibhai Gobarbhai Chaudhary, Proprietor of M/s Arbuda Builders, Visnagar filed to satisfactory conclude the work of the project according to joint venture agreement, the parties nullified the agreement executed on 26-7-2002 and by an agreement of sub contract dated 2-12-2003, M/s Arbuda Builders was entrusted the whole project as sub contractor. That the aforesaid criminal case Nos.1107 of 2004 and 1106 of 2004 came to be filed by the respondent No.2 herein in the Court of learned JMFC, Visnagar against Goodwill Advance Construction Company joint venture M/s Arbuda Builders, Visnagar including Kantibhai Gobarbhai Chaudhary and the applicant for the offence punishable u/s 138 and 141 of the Act. That prior to filing of the said complaint, the respondent No.2 issued notice dated 15-4-2004 through its advocate as contemplated u/s 138 of the Act and it is the case of the applicant that looking to the contents of the complaint and the said notice which is crystal clear that every transaction has been made by the Kantibhai Gobarbhai Chaudhary of M/s Arbuda Builders, Visnagar and that he has assured the respondent No.2 , original complainant of the liability for the payment. It is submitted that behind the back of the applicant, the co-accused Kantibhai Gobarbhai of M/s Arbuda Builders

opened the account in the joint venture named Goodwill Advance Construction Company joint venture M/s Arbuda Builders, Visnagar in State Bank of India at Visnagar and that the applicant who has stationed at Kota, Rajasthan had nothing to do with any purchase made by Kantibhai Gobarbhai Chaudhary of M/s Arbuda Builders, Visnagar from the respondent No.2, original complainant. It is submitted that looking to the facts of the present case, it is crystal clear that the co-accused Kantibhai Gobarbhai Chaudhary had purchased 1000 bags of cement on 5-2-2004 from the respondent No.1, original complainant on credit basis and that said Kantibhai got issued the bill in the name of Goodwill Advance Construction Company joint venture M/s Arbuda Builders, Visnagar. It is submitted that the day on which the said purchase was made, the joint venture had no existence at all. It is submitted that it seems that said Kantibhai Gobarbhai of M/s Arbuda Builders had issued a Cheque in question from the alleged account opened by him without the knowledge of the applicant which was returned because the account on which the said cheque was drawn was closed by then. It is the case of the applicants that on receiving the notice under section 138 of the Act, the applicant replied it through an advocate clearly mentioning that it is not possible for the account from which the said cheques have been issued. It was also made clear that said Kantibhai must have with the connivance of Bank Officer falsely opened the account in the name of joint venture. It is submitted that even the applicant has not signed the

aforesaid cheques and even the allegations levelled in the complaint and notices are only against Kantibhai in his personal capacity and for which he alone is liable. It is submitted that when the applicant has not signed the cheque and all the allegations made in the complaint and notices are against said Kantibhai in his personal capacity, the Id. Magistrate could not issue the process against the applicant. It is submitted that issuance of process is not an empty formality. Looking to the allegation in the complaint, it is requested to quash the complaint as no case has been made out against the applicants u/s 138 of the said Act. It is further submitted that in absence of any specific allegation in the complaint pertaining to vicarious liability u/s 141 of the Act about controlling day to day affairs and in charge of the said joint venture, the applicant cannot be proceeded against in the present complaint. Therefore, it is requested to quash the complaint so far as the applicants, original accused Nos.5 are concerned.

5. Applications are opposed by Shri PK Jani, learned advocate appearing on behalf of the respondent No.2, - original complainant. It is submitted that even after the alleged resolution of the joint venture, even as per the sub contract entered into on 2-12-03, the applicant was the beneficiary of some profit and therefore, it cannot be said that the petitioner has nothing to do with the said joint venture. It is submitted that when the cheque has been issued by Goodwill Advance Construction Company joint

venture M/s Arbuda Builders, Visnagar and the petitioner being one of the partner of the said joint venture, the petitioner cannot be abscond from liability and therefore, it is requested to dismiss the present applications.

6. Shri Kodekar, learned APP has requested to pass appropriate order considering the averments in the complaints.

7. Heard the learned advocates appearing on behalf of the parties.

8. It is required to be noted that the chques in question are issued by one Kantibhai Gobarbhai Chaudhary as Administrator of the Goodwill Advance Construction Company joint venture M/s Arbuda Builders, Visnagar under the stamp of the aforesaid joint venture. It is to be noted that the applicants herein Goodwill Advance Construction Company joint venture M/s Arbuda Builders, Visnagar is one of the partner of the said joint venture. Now looking to the averments in the complaint, it is the specific case on behalf of the respondent No.2, - original complainant that the cement bags have been purchased by one Kantibhai Gobarbhai and at his instance, the bills were got prepared in the name of Goodwill Advance Construction Company joint venture M/s Arbuda Builders, Visnagar and he was making the payment. It is also averred in the complaints that said Kantibhai has also assured the complainant that said Kantibhai has assured

that the liability to make the payment would be of Kantibhai and therefore, the complainant has put trust in him. It is also specifically mentioned in the complaint that goods in question have been purchased by Kantibhai and at his instance, the bill was prepared in the name of Goodwill Advance Construction Company joint venture M/s Arbuda Builders, Visnagar and that the payment is to be made by said Kantibhai, the owner of M/s Arbuda Builders. It is also mentioned in the complaints that the cheque was given by Kantibhai. Thus, considering the entire complaints, the allegations are against said Kantibhai Gobarbhai, owner of M/s Arbuda Builders. It is true that the cheques have been issued by Goodwill Advance Construction Company joint venture M/s Arbuda Builders, Visnagar signed by Kantibhai and the said joint venture is original accused No.1. Now so far as the applicants, - original accused No.5 is concerned, it can be said that it has only a partner in the aforesaid joint venture. There are no allegations in the aforesaid complaints that the applicant was in any way connected with the management of the said joint venture and/or the cheques are signed by the applicant. There are no allegations and/or the averments in the complaint pertaining to the vicarious liability u/s 141 of the Act against the applicant about controlling day to day affairs and in charge of the said joint venture. On the contrary, as stated above, the allegations and the averments are only against Kantibhai Gobarbhai and that he was in charge of the joint venture; he has purchased the goods; he has issued the aforesaid cheques

singed by him, therefore, no case has been made out against the applicants, - original accused No.5 for the offence punishable u/s 138 read with section 141 of the Act. Now considering the above and in absence of specific allegations against the applicant in the complaint holding the applicant vicariously liable, the learned trial Court has committed an error in issuing the process against the applicant, as allegations in the complaint did not specify the ingredients of provisions of section 141 of the Act. Under the circumstances, the process issued by the learned trial Court in the aforesaid criminal complaints against the applicant, original accused No.5 requires to be quashed and set aside.

9. For the reasons stated above, both the applications succeed. The process issued by the Id. JMFC, Visnagar against the applicant, original accused No.5 in Criminal Case Nos.1106 of 2004 and 1107 of 2004 are hereby quashed and set aside. Rule made absolute.

(M.R. Shah, J.)

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